Machine Stone Workers, Rubbers, Sawyers and Helpers Local 89, a/w Tile, Marble and Terrazzo Finishers and Shopmen International Union, AFL–CIO (Bybee Stone Company, Inc.) *and* **Edward W. Najam, Jr. Case 25–CB–4143**

November 24, 1982

DECISION AND ORDER

On March 16, 1981, Administrative Law Judge Stanley N. Ohlbaum issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Machine Stone Workers, Rubbers, Sawyers and Helpers Local 89, a/w Tile, Marble and Terrazzo Finishers and Shopmen International Union, AFL–CIO, its officers, agents, and representatives, shall take the action set forth in the said recommended Order.

MEMBERS FANNING and JENKINS, concurring in part and dissenting in part:

We agree with our colleagues that Respondent lawfully expelled four members because they voted against it in a representation election. However, contrary to our colleagues and for the reasons set forth in our dissent in *Blackhawk Tanning Co.*,[1] we would find that Respondent did not violate Section 8(b)(1)(A) by fining the four members because of their votes. Indeed, the precise example we used there[2] to illustrate that the majority's "qualitative" difference between fines and expulsion was illusory and could not be effectively applied has come to life in the instant case, for here, the expulsion results in the loss for each member of death benefits totaling $1,700,[3] while the fine amounts to $100, which Respondent has not even made an attempt to collect. Accordingly, we would dismiss the complaint in its entirety.

[1] *International Molders' and Allied Workers Union, Local No. 125, AFL–CIO (Blackhawk Tanning Co., Inc.)*, 178 NLRB 208, 209 (1969).

[2] *Blackhawk Tanning Co.*, 178 NLRB at 211.

[3] The record shows that after his expulsion from Respondent Wallace Prather died, and the parties stipulated that if Prather had not been expelled his estate would have received $1,700 in death benefits.

DECISION

PRELIMINARY STATEMENT; ISSUE

STANLEY N. OHLBAUM, Administrative Law Judge: This proceeding[1] under the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.* (Act), was litigated before me in Bloomington, Indiana, on January 28, 1981, with all parties participating throughout by counsel, who were afforded full opportunity to present evidence and argument, and thereafter to file briefs. A brief was received from the General Counsel on March 2 and from Respondent on March 9, 1981. Those, as well as the record, have been carefully considered.

The basic issue is whether Respondent Union violated Section 8(b)(1)(A) of the Act by fining and expelling four of its members for voting against union representation in a Board-conducted election.

Upon the entire record[2] I make the following:

FINDINGS AND CONCLUSIONS

I. PARTIES; JURISDICTION

At all material times, Respondent has been and is a labor organization as defined by Section 2(5) of the Act. At all of those times, Bybee Stone Company, Inc., has been and is engaged in the manufacture, sale, and distribution of Indiana limestone and related products at and from its stone quarry and mill, its principal place of business and office in Ellettsville, Indiana. In the course and conduct of that business in that place in the 12-month period ending April 28, 1980, said Company sold and shipped therefrom, directly in interstate commerce to places outside of Indiana, merchandise valued at over $50,000. I find that at all material times said Company has been and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Facts as Found*

Facts and testimony have been stipulated, leaving only questions of law. The case is said to be unprecedented.

Monroe County, Indiana, in which the Bybee stone quarry as well as six others are located, covers an area of approximately 20 by 20 miles. The Bybee quarry is located in Ellettsville, another quarry some 7 miles distant in Bloomington, and the others elsewhere in the county. It is stipulated that of these seven quarries only Bybee is ununionized and does not operate under a collective agreement with the Union.[3]

On October 12, 1979, a Board-conducted election was held in the Bybee unit to determine the employees' desires for representation by the Union. At that time, four of the seven voting unit employees were voluntary mem-

[1] Upon complaint of the Board's Regional Director for Region 25 issued June 30 as amended December 12, growing out of charge filed on April 28, 1980.

[2] No issue of demeanor is presented, the facts being stipulated.

[3] I.e., Respondent Local 89, whose parent International is not a party to this proceeding.

bers of the Union.[4] The tally of ballots disclosed that all seven voters, including the four union members, had voted against representation by the Union. Thereafter, on December 17, 1979, based upon charges duly preferred under the Union's constitution and bylaws, and trial before the Union's executive board sitting as a duly constituted trial board, the four union members—Wylie L. Lawhead, James McCammon, Wallace H. Prather, and Russell T. Fulford—were each fined $100 and expelled from the Union. These actions were subsequently, on January 18, 1980, sustained and confirmed by the Union's membership. It is conceded that none of the employees pursued any appeal or any further avenues of correction or redress afforded under the Union's constitution and bylaws.

It is conceded by Respondent Union that these disciplinary actions were imposed solely for the reason that the four union members had voted against union representation in the Board-conducted election. It is also conceded that the Union's acquisition of knowledge as to how its members had voted in the election was derived solely from the publicly disclosed official tally of ballots (which, as indicated above, were unanimous against union representation), and not through interrogation, intimidation, trickery, deceit, or any improper means—in the Charging Party's words, "it was entirely fortuitous."

It is stipulated that the jobs of all four expelled union members have remained unaffected by their expulsion from the Union. It is further stipulated that the Union has made no effort or threat to enforce the fines.

B. *Determination and Rationale*

There are presented here the legal questions of (1) whether the Union's fining and expulsion of members who voted, in a Board-conducted representation election, against representation by the Union, where knowledge of how they voted has been acquired by the Union through no improper means, is violative of the Act; and (2) whether such actions violate the Act where the affected union members have failed to exhaust the Union's internal appellate procedures available to them.

Addressing the second question first, it would appear that the right of union members to seek redress under the Act from their allegedly improper discipline by the Union may not be subordinated to internal union requirements. Cf. Section 10(a); *N.L.R.B.* v. *Industrial Union of Marine & Shipbuilding Workers of America* [*U.S. Lines Co.*], 391 U.S. 418 (1968); *International Union of Operating Engineers Local 400, AFL-CIO (Hilde Construction Company)*, 225 NLRB 596 (1976); *Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local No. 521 (Arthur G. McKee & Company)*, 189 NLRB 553 (1971).

As to the first and basic question of whether the fines and expulsions here were violative of the Act, counsel indicate the point is of novel impression.

Section 8(b)(1)(A), which is claimed to have been violated here, provides that:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7:[5] *Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein* . . . . [Emphasis supplied.]

The basic legislative purpose of the Act, as set forth in its preamble, is to attempt to reduce the imbalance in the economic power of employees and employers by encouraging free association of employees to bargain collectively through labor organizations of their choice. Such labor organizations were viewed and function as potentially patent collective-bargaining instrumentalities, rather than as social clubs or burial societies, although, to be sure, they are not precluded from fulfilling such purposes as well. To compel, as here suggested, labor organizations to continue in their ranks as members persons who are opposed to collective bargaining by a union which they have designated for that purpose and to which they have pledged their allegiance and support, is not only inconsistent with the most fundamental tenet and principle of trade unionism or, indeed, any kind of organizational maintenance and integrity, but thwarts rather than supports the basic underlying purpose of the Act; i.e., to foster collective bargaining.

In *N.L.R.B.* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 180–181 (1967), the Supreme Court pointed out that, under the Act, collective bargaining is a cornerstone of national labor policy, and that unions in fulfilling their role in that process must be free to make their own rules and impose discipline on members accordingly within a "wide range of reasonableness" (388 U.S. at 180). Two years later, in *Scofield* v. *N.L.R.B.*, 394 U.S. 423, 430 (1969), the Court added that:

> §8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule.

In *International Molders' and Allied Workers Union, Local No. 125 (Blackhawk Tanning Co., Inc.)*, 178 NLRB 208 (1969), enfd. 442 F.2d 92 (7th Cir. 1971), it was held not violative of Section 8(b)(1)(A) for a union to expel a member for filing a decertification petition. To the same effect, see *Tawas Tube Products, Inc.*, 151 NLRB 46, 47–49 (1965). The Board has also held that it is not violative of Section 8(b)(1)(A) for a union to expel members for attempting to replace the union with another union (*Los Angeles County District Council of Carpenters, et al. (Hughes Helicopters, Division of Summa Corporation)*, 224

[4] None was a member under any maintenance of membership provision. Indeed, one (Lawhead) had formerly been general president of Respondent Union's parent International Union, as well as business agent of Respondent Local for many years.

[5] Sec. 7 assures employees:

> . . . the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and . . . the right to refrain from any or all such activities . . . .

NLRB 350 (1976)) or for failing to assist the union in its additional outside organizing efforts (*Amalgamated Meat Cutters and Allied Workers of North America, Local 593 (S & M Grocers, Inc.)*, 237 NLRB 1159 (1978)). *A fortiori* it must be regarded as not violative of Section 8(b)(1)(A) for a union to expel members who, as here, have taken actions directly derogatory to and inconsistent with maintenance or promotion of its representational status in the very unit involved.

It is contended that to permit the Union to expel members for the way they voted in a Board-conducted election would impair the secrecy of their ballot, infringe upon the right to vote against union representation, and interfere with the Board's election processes. Under the conceded circumstances of this case, I do not agree. In no way was the secrecy of the ballot here impaired. The voters cast secret ballots. The fortuitous coincidence that they all voted the same way, the result being apparent from the officially published tally, does not detract from the secret manner in which their ballots were cast. It could not be seriously argued that such a fortuitous outcome requires the election to be set aside because its "secrecy" has been compromised. The election processes of the Board are not cognizably flawed when it opens a single determinative challenged ballot, or multiple determinative challenged ballots of given individuals and those ballots all turn out to have been cast the same way.

Nor was there any infringement of the right of any voter, or restraint of the same right of any future voter, to vote as he pleased or may hereafter please. Union members could and may hereafter vote against representation by their own Union—but they may not, if their vote is self-disclosed or otherwise becomes known through means neither unlawful nor improper, insist on their right to remain members of the Union. Nor has the Board's election process in any way been interfered with through the expulsions here. Respondent Union concededly having in no way been involved in wrongdoing or impropriety in discovering how its members cast their votes, the case presented is essentially no different from that of a union member who is expelled for campaigning against union representation while insisting he has the right to continue to belong to the union. If persons opposed to representation by their own union have the right to insist on continued membership in the union, it would render meaningless the *proviso* to Section 8(b)(1)(A) explicitly preserving to unions the right to prescribe the qualifications of their own membership.[6]

Although the Board has held expulsion from union membership under the *proviso* to Section 8(b)(1)(A) not violative of the Act, it has nevertheless held imposition of a fine to be violative. *International Molders' and Allied Workers Union, Local No. 125 (Blackhawk Tanning Co., Inc.)*, 178 NLRB 208 (1969), enfd. 442 F.2d 92 (7th Cir. 1971); *Independent Shoe Workers of Cincinnati, Ohio (The United States Shoe Corporation)*, 208 NLRB 411 (1974). In the instant case, the fines were coupled with the expulsions, but only the expulsions were carried out and the fines remain a dead letter. It is stipulated that the Union has neither enforced nor threatened to enforce the fines. In *Independent Shoe Workers of Cincinnati, Ohio (The United States Shoe Corporation), supra*, the Board held it to be violative of Section 8(b)(1)(A) for a union to fine its members for soliciting union representational cards for a rival union to support the filing of a Board-conducted certification election. To the same effect, see *Local 6306, Communication Workers, AFL-CIO (Vactec, Incorporated)*, 212 NLRB 768 (1974), enfd. 519 F.2d 447 (8th Cir. 1975). Likewise, in *Tool and Die Makers Lodge No. 113, International Association of Machinists and Aerospace Workers, AFL-CIO (Midwest Dental Division of American Hospital Supply Corporation)*, 207 NLRB 795 (1973), the Board held it violative of Section 8(b)(1)(A) for a union to fine a member who had filed a deauthorization petition. But under *Vactec, Meat Cutters (S & M Grocers), Blackhawk*, and other cases cited *supra*, it would not have been violative of Section 8(b)(1)(A) for the union to have expelled those members, rather than to have fined them.[7]

In this posture of the decided cases, I am constrained to conclude that, although Respondent Union's actions in expelling its members did not violate Section 8(b)(1)(A), the lesser discipline of fining them did violate that section. By way of added justification to support this result here, it may be observed that although the *proviso* to Section 8(b)(1)(A) permits unions to set their own terms of membership, since here the four members in question were unconditionally expelled, the fines simultaneously imposed may hardly be viewed as conditions "with respect to the . . . retention of membership." (Section 8(b)(1)(A).) Moreover, notwithstanding Respondent's failure to press for their collection, those fines may still theoretically be attempted to be pursued to collection, or to bar the persons against whom imposed from reentry into the Union, if otherwise deemed appropriate, until their liquidation. Furthermore, unless erased, their imposition may well be regarded as having a continuingly hovering coercive or restraintful impact or potential

[6] Clearly distinguishable are cases, cited by the General Counsel, where a union disciplines a member for filing an unfair labor practice charge (*N.L.R.B.* v. *Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418 (1968)) or encouraging others to do so. (*Philadelphia Moving Picture Machine Operators' Union, Local 307, I.A.T.S.E. (Velio Iacobucci)*, 159 NLRB 1614 (1966), enfd. 382 F.2d 598 (3d Cir. 1967)), or for refusing to participate in an unprotected strike (*Local No. 18, International Unions of Operating Engineers (B. D. Morgan & Company, Inc.)*, 205 NLRB 487 (1973), modified 503 F.2d 780 (6th Cir. 1974); *Glaziers Local No. 1162, affiliated with the Brotherhood of Painters, etc. (Tusco Glass, Inc.)*, 177 NLRB 393 (1969)), since such disciplinary actions unlawfully impede access to the Board's processes or seek to compel union members to engage in illegal activity.

[7] It is to be observed, however, that in *Meat Cutters (S & M Grocers), supra*, the Board, by 3-to-2 vote, dismissed the complaint although the respondent union had written its members that it would discipline them, "including but not limited to expulsion" (237 NLRB at 1159), if they refrained from assisting or actively opposed its attempted organizational activities. The Board there rationalized that "in the present case, the Respondent's threat of a fine was aimed not at deterring members from invoking the Board's procedures, but at requiring its members to support the organizational effort." 237 NLRB at 1161. Cf. also *Minneapolis Star and Tribune Company, et al.*, 109 NLRB 727 (1954) ($500 fine of union member for failing to picket or attend union meetings during strike held not violative of Sec. 8(b)(1)(A)); and *N.L.R.B.* v. *Local No. 18, International Union of Operating Engineers, AFL-CIO [B. D. Morgan & Co.]*, 503 F.2d 780 (6th Cir. 1974) (fine, as well as expulsion, held proper by court, modifying Board decision, holding neither proper).

against those eligible to vote in any future Board-conducted election.

Upon the basis of the foregoing findings and the entire record, I state the following:

CONCLUSIONS OF LAW

1. Jurisdiction is properly asserted in this proceeding.
2. By expelling from its membership its members Wylie L. Lawhead, James McCammon, Wallace H. Prather, and Russell T. Fulford, under the circumstances found in section II,A, *supra*, Respondent did not violate Section 8(b)(1)(A) of the Act.
3. By fining each of said members, under the circumstances found in section II,A, *supra*, Respondent committed unfair labor practices in violation of Section 8(b)(1)(A) of the Act.
4. Said unfair labor practices have affected and, unless permanently restrained and enjoined, will continue to affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Respondent, having been found to have engaged in unfair labor practices in relation to fining, but not in expelling, its members, should be required to desist from such fining practices, to expunge from its records the fines here imposed, to make no effort to enforce them, to notify the fined individuals, and to post a notice to its members to that effect. In order to guard against a potentially serious, while reasonable and understandable, misapprehension or misunderstanding by Respondent's members of the existing technical legal rule that although they may not lawfully be fined for conduct inconsistent with loyalty to the Union they may nevertheless lawfully suffer the greater penalty of being expelled for it, the posted notice to members should make that danger clear to them. And Respondent should report to the Board's Regional Director its compliance with these requirements.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, there is hereby issued the following recommended:

ORDER[8]

The Respondent, Machine Stone Workers, Rubbers, Sawyers and Helpers Local 89, a/w Tile, Marble and Terrazzo Finishers and Shopmen International Union, AFL-CIO, its officers, representatives, and agents, shall:

1. Cease and desist from fining or imposing fines upon its members, or threatening to do so, because of the fact that such members vote or indicate they have voted or will vote against representation by the Union in any election conducted by the National Labor Relations Board; without prejudice, however, to the Union's right to expel such members from its membership or otherwise to take action lawful under the *proviso* to Section 8(b)(1)(A) of the National Labor Relations Act, as amended, based upon information lawfully obtained by the Union.
2. Take the following affirmative actions necessary to effectuate the policies of the Act:

(a) Forthwith remit, cancel, and expunge the fines imposed by the Union's executive trial board on or about December 17, 1979, and confirmed by the union membership on or about January 18, 1980, upon Wylie L. Lawhead, James McCammon, Wallace H. Prather, and Russell T. Fulford; make no attempt to enforce or collect any thereof; and notify the foregoing individuals by registered or certified mail to that effect.

(b) Post at Respondent's business offices, union halls, and meeting places copies of the attached notice marked "Appendix."[9] Copies thereof, on forms provided by the Board's Regional Director for Region 25, shall be duly signed and posted immediately upon receipt thereof, and maintained for 60 days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify said Regional Director, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that, in all respects not herein expressly found to have constituted a violation of the Act, and specifically in regard to the expulsion of Wylie L. Lawhead, James McCammon, Wallace H. Prather, and Russell T. Fulford from Respondent Union's membership, the complaint herein, as amended, be and it is hereby dismissed.

[8] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT fine or threaten to fine any of our members for voting against union representation in any election conducted by the National Labor Relations Board to determine employees' representational desires; without, however, impairing our right to expel from our membership (or otherwise to exercise our right, as provided by Section 8(b)(1)(A) of the National Labor Relations Act, to prescribe our own rules with respect to the acquisition or retention of membership in our Union) any of our members voting against representation by our Union, where our knowledge of such voting has not been obtained in an unlawful manner.

WE WILL cancel and expunge from our records the fines we imposed on December 17, 1979, and January 18, 1980, on our expelled former members Wylie L. Lawhead, James McCammon, Wallace H. Prather, and Russell T. Fulford, for so voting; WE WILL make no attempt to enforce or collect any of those fines; and WE WILL notify them by mail to that effect.

MACHINE STONE WORKERS, RUBBERS, SAWYERS AND HELPERS LOCAL 89, A/W TILE, MARBLE AND TERRAZZO FINISHERS AND SHOPMEN INTERNATIONAL UNION, AFL-CIO